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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ANDREA TANTAROS,

Petitioner,

v.

19-cv-7131 (ALC)

FOX NEWS NETWORK, LLC, WILLIAM SHINE,  
THE ESTATE OF ROGER AILES,  
SUZANNE SCOTT, IRENA BRIGANTI, and  
DIANE BRANDI,

Respondents.

Conference

New York, N.Y.  
August 5, 2019  
1:10 p.m.

Before:

HON.ANDREW L. CARTER, JR.

District Judge

APPEARANCES  
(via telephone)

WOLF HALDENSTEIN ADLER FREEMAN & HERZ  
Attorneys for Petitioner

BY: DEMET BASAR, ESQ.  
DANIEL TEPPER, ESQ.  
-and-

FEIN & DELVALLE, PLLC  
Attorneys for Petitioner  
BY: BRUCE FEIN, ESQ.

THOMPSON & KNIGHT, LLP  
Attorneys for Respondent Shine  
BY: MARION J. BACHRACH, ESQ.  
EVELYN H. SEELER, ESQ.

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1 APPEARANCES (Cont'd)

2 JONES DAY

Attorneys for Respondents Fox Network LLC,  
3 Irena Briganti, Diane Brandi, and Suzanne Scott  
BY: MATTHEW W. LAMPE, ESQ.  
4 KRISTINA A. YOST, ESQ.

5 QUINN EMANUEL URQUHART & SULLIVAN

Attorneys for the Estate of Roger Ailes  
6 BY: BRENDAN CARROLL, ESQ.  
KIMBERLY CARSON, ESQ.  
7 PETER CALAMARI, ESQ.

8  
9 (Case called)

10 THE CLERK: Counsel, please state your appearance for  
11 the petitioner.

12 MS. BASAR: Demet Basar and Dan Tepper from Wolf  
13 Haldenstein in New York. We've filed our notices of  
14 appearance -- good morning -- and filed plaintiff's motion for  
15 a remand. We are in the process of preparing --

16 THE CLERK: Hello. Excuse me. I just want to let  
17 everyone note their appearance first. Thank you.

18 And for the respondent.

19 MR. FEIN: Excuse me. Could I also -- I am Bruce Fein  
20 for the petitioner Tantaros. I am pro hac vice pending  
21 motions. And Ms. Basar will make an oral motion to have me  
22 admitted for this conference call.

23 THE CLERK: Thank you.

24 And for the respondents?

25 MR. LAMPE: This is Matt Lampe of Jones Day, along

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1 with Kristina Yost of Jones Day. We represent four of the  
2 respondents: Fox Network LLC, Irena Briganti, Diane Brandi, and  
3 Suzanne Scott.

4 MR. CARROLL: Hi. Carroll here from Quinn Emanuel  
5 Urquhart & Sullivan. Peter Calamari is on the phone as well.  
6 We represent the Estate of Roger Ailes. Kimberly Carson is on  
7 the line as well.

8 MS. BACHRACH: And this is Marion Bachrach from  
9 Thompson & Knight representing respondent William Shine,  
10 S-h-i-n-e, and Eve Seeler, also on the phone.

11 THE COURT: OK. Good afternoon, everyone.

12 So plaintiff's counsel was starting to say something.  
13 What is it you were going to say, counsel?

14 MS. BASAR: Good afternoon, your Honor. Demet Basar  
15 here from wolf Haldenstein for petitioner.

16 This morning, we filed notices of appearance for  
17 myself and for my partner, Dan Tepper, who is also on the line.  
18 And we also filed a motion for remand on behalf of petitioner  
19 Andrea Tantaros. Petitioner is represented by Bruce Fein, who  
20 is on the line, who is a member of the D.C. bar. And we are in  
21 the process of preparing his pro hac application. And we would  
22 like to orally move for Mr. Fein's admission pro hac vice  
23 today, so he can formally appear before you.

24 THE COURT: Any objection to that from defendants,  
25 respondents?

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1 All right. So you are admitted for today's purposes.

2 Go ahead, counsel. You indicated that you were filing  
3 a motion or that you have filed a motion for remand?

4 MR. FEIN: Yes.

5 MS. BASAR: Bruce --

6 MR. FEIN: OK. This is Bruce Fein speaking. Yes.  
7 There was a motion filed based on the theory that three of the  
8 four criteria that Chief Justice John Roberts articulated in  
9 the *Gunn v. Minton* case for establishing federal question  
10 jurisdiction when the cause of action does not arise under  
11 federal law have not been met and the case should be returned  
12 to the New York State court.

13 THE COURT: OK. What is respondents' view on this?  
14 What is respondents' view on all of this?

15 MR. LAMPE: Your Honor, this is Matt Lampe on behalf  
16 of the four respondents identified earlier.

17 We will oppose that motion. Our position is that all  
18 four of the prongs outlined in the *Gunn* case, *Grable* case, are  
19 in fact satisfied here. And this case does raise a serious  
20 federal interest. And it's an interest in insuring the uniform  
21 and proper application of FAA law. And we will argue in our  
22 opposition brief that the case was properly removed under that  
23 *Gunn/Grable* doctrine.

24 THE COURT: OK. I haven't seen the motion yet. But  
25 let me just state some of the other concerns that I have and

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1 make sure that these get addressed in the motion and in the  
2 responses.

3 I want to just, first of all, get some things clear to  
4 make sure we're all on the same page procedurally. The  
5 arbitration has currently been stayed. Is that correct?

6 MR. FEIN: This is Bruce Fein. Your Honor, it has  
7 been stayed de facto. I think the parties have represented to  
8 the panel that until this issue of 7515 is decided, either by  
9 the New York court or your court, that the panel should refrain  
10 from any further rulings.

11 THE COURT: OK. The other concern that I have -- and  
12 I'm not sure if it is addressed in the motion to remand -- is,  
13 it seems to me that New York courts have not had an opportunity  
14 yet to decide in the first instance whether or not CPLR 7515  
15 runs retroactively. Am I correct there? Has the court made a  
16 ruling on that, to counsel's understanding, at this point?  
17 From either side?

18 MR. FEIN: This again is Bruce Fein, speaking for the  
19 petitioner. We could not find anything with regard to a state  
20 court decision. There was a federal court decision that's  
21 referenced in the papers, the *Lati* case, that was decided in  
22 the Southern District of New York. But that court decision  
23 does not address the retroactivity issue that you have flagged.  
24 It simply jumped over it, and is a decision based upon a  
25 different theory.

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1           THE COURT: It seems to me that one thing that the  
2 parties should address is whether or not I have jurisdiction to  
3 here these arguments and whether or not there are some  
4 arguments that I have jurisdiction to hear and others that I  
5 don't, and whether or not, even if I have jurisdiction, I  
6 should abstain from exercising that jurisdiction. In  
7 particular, it seems to me that there is an argument, there is  
8 an issue regarding whether or not this statute runs  
9 retroactively. It seems to me from the face of the petition  
10 and the removal petition as well as the underlying complaint  
11 that the contracts were entered into well in advance of the  
12 amendment to CPLR 7515. It seems to me that New York State  
13 should be the ones to decide whether or not that runs  
14 retroactively and that I should not be deciding that issue.  
15 And I'd like the parties to address that in their motions, as  
16 to whether or not I should be addressing that issue at all.

17           It does seem to me that if New York had determined,  
18 although that's not the case, if New York had determined that  
19 this statute did not run retroactively, then it would seem to  
20 me that there would be a stronger argument that I don't have  
21 any jurisdiction over this matter. There would be no need at  
22 all for me to get into issues of the FAA and whether or not  
23 that preempts the CPLR provision. But let me get counsel's  
24 initial thoughts on that if you have any. But it does seem to  
25 me that that's something that should be addressed. Let me hear

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1 from plaintiff on that briefly.

2 MR. FEIN: Your Honor, the notice of removal makes no  
3 allusion -- I mean, it doesn't raise that issue as something  
4 that should be decided by the federal court. It simply rests  
5 completely on interpreting the Federal Arbitration Act as  
6 preempting 7515. As a consequence, in the motion to remand  
7 that we have filed, we did raise issues that weren't raised  
8 specifically in the notice of removal. But we're certainly  
9 prepared to file a supplemental memorandum of law that  
10 addresses that particular issue. But we adopt what the notice  
11 of removal stated as its justification.

12 THE COURT: OK. Let me hear from the defendants on  
13 this.

14 MR. LAMPE: Your Honor, Matt Lampe. Our position is  
15 that the statute does not apply to the contract at issue here.  
16 However, based on the face of the petition as it was filed, the  
17 petition does raise the substantial federal question of whether  
18 or not the CPLR 7515 is preempted by the FAA. On that basis we  
19 removed. If the Court denies the motion to remand and  
20 determines that it has jurisdiction over the case, we would  
21 expect that the next thing for the Court to decide is a motion  
22 to dismiss. Certainly in that motion to dismiss we would  
23 assert preemption. We would also assert other defenses that  
24 are available on the face of the complaint. One of them would  
25 be that the statute does not apply retroactively here. I could

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1 understand the Court not deciding the second question depending  
2 on how it decides the first question. But on the face of the  
3 petition as it was filed, the basis for removal that we have  
4 invoked in our removal petition is valid.

5 MR. FEIN: Your Honor, Mr. Fein again responding. I  
6 don't think that makes much sense. The fact is, the first  
7 issue that they're saying that they want to press is whether  
8 the statute 7515 is retroactive. If it's not retroactive, then  
9 the Federal Arbitration Act doesn't enter into the equation at  
10 all. So it couldn't possibly be an argument that is addressing  
11 federal law, simply that the New York law doesn't apply here.  
12 That isn't a federal question. That's interpretation of state  
13 law. So they can't have it both ways, stating on one hand they  
14 want state law to control for purposes of the merits and on the  
15 other hand for jurisdictional purposes you are to blind  
16 yourself to the state law and jump to the Federal Arbitration  
17 Act, which doesn't come into play until you've decided the  
18 retroactivity.

19 THE COURT: OK. Let's just do this. Let me just find  
20 out, I haven't had a chance to look at the motion to remand.  
21 It sounds as if the plaintiffs did not specifically deal with  
22 this issue in the motion to remand. Is that correct?

23 MR. FEIN: That's correct, because it wasn't raised in  
24 the notice of removal.

25 THE COURT: OK. It seems to me that it certainly



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1 might be something that's necessary for me to at least think  
2 about, in terms of whether or not I have jurisdiction. It  
3 seems to me that that's a component of me determining whether  
4 or not I have jurisdiction as to how substantial the federal  
5 issue is, how necessary it is. Obviously "necessary" under  
6 federal law doesn't mean it's absolutely positively necessary,  
7 but it does seem to me that it's something that I should be  
8 considering. And it certainly is something that seems relevant  
9 to any notions of abstention, if that's appropriate in this  
10 case, as well.

11 So let me go ahead and give the plaintiffs an  
12 opportunity to supplement their motion to remand and deal with  
13 that issue, and let's go ahead and set a schedule for the  
14 defendants to oppose the motion to remand, if that makes sense  
15 procedurally. Does that make sense to everyone procedurally?

16 MR. FEIN: It does for the petitioner, your Honor.

17 MR. LAMPE: For respondents, your Honor, that makes  
18 sense. On the answer date we have a deadline of August 19.  
19 Assuming that the purpose has been effectuated, our deadline  
20 for answering and/or moving to dismiss, which I understand  
21 under your Honor's individual practice would be a pre-motion  
22 letter, but that deadline is the 19th of August. So your Honor  
23 may give us some guidance whether or not that deadline will be  
24 stayed or, if not, whether we should just, simultaneously with  
25 this motion to remand briefing, submit our pre-motion letter

1 related to the forthcoming motion to dismiss on the deadline.

2 THE COURT: It seems to me to make sense to stay any  
3 deadline to answer or file any motion to dismiss. I first need  
4 to deal with the issue of jurisdiction. But let's go ahead and  
5 give some deadlines. Let's have the plaintiffs/petitioners  
6 file their supplemental brief by, let's get that in in a week.  
7 Is that enough time for counsel?

8 MR. FEIN: Yes. This is Mr. Fein for the petitioner.  
9 Yes, we will call this a supplemental memorandum of law in  
10 support of the motion to dismiss. And we'll file that August  
11 12th.

12 THE COURT: All right. So let's get that supplemental  
13 memo of law regarding the motion to remand August 12th. Let's  
14 have the respondents respond to that by September the 3rd. And  
15 if there is a need for a reply, then let's have a date for the  
16 reply of September the 6th.

17 It also seems to me procedurally that it -- well, I'm  
18 not sure it makes any sense for me to issue any orders staying  
19 arbitration until I'm certain that I have jurisdiction over  
20 this matter. And since the arbitration has been stayed de  
21 facto, perhaps that's just totally a moot point. Do counsel  
22 have any thoughts on that?

23 MR. FEIN: This is Mr. Fein. I think until you  
24 establish subject matter jurisdiction, the better course of  
25 action is to refrain from issuing any ruling. That comes

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1 first. And I'm confident that, with the consensus of all  
2 respondents and petitioners, that the panel should refrain --  
3 and the panel has not indicated that it's going to ignore a  
4 consensus -- that it's superfluous for you to issue any order  
5 right now on the panel.

6 THE COURT: OK. Anything from respondents on this?

7 MR. LAMPE: This is Matt Lampe. I agree with  
8 Mr. Fein's assessment.

9 THE COURT: All right. So we have those deadlines.  
10 Let me just ask a question regarding efficiency here. How far  
11 has the arbitration progressed at this point? I understand at  
12 this point there are some issues regarding discovery. But is  
13 the arbitration, or was it, close to being finished?

14 MR. LAMPE: Your Honor, this is Matt Lampe for the  
15 respondents, for the four respondents. The arbitration has  
16 been pending for three years. After this CPLR 7515 statute  
17 went into effect, the petitioner Tantaros continued to  
18 prosecute her claims in that arbitration, seeking relief from  
19 the arbitration panel and obtaining some relief from that  
20 arbitration panel. The respondent also sought and obtained  
21 relief from that arbitration panel. There is suggestion in  
22 plaintiff's petition there has been delay on the responsibility  
23 of respondent. Our position is exactly the opposite, that the  
24 delay is on the account of Ms. Tantaros's refusal to  
25 participate in discovery. So what's currently in the

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1 arbitration right now is respondents' motion to dismiss  
2 Ms. Tantaros' claims because of failure to participate in the  
3 discovery process. And the day that we filed our reply in  
4 support of that motion to dismiss was the day that Ms. Tantaros  
5 filed her petition in state court. A year after the statute  
6 went into effect, to all of a sudden determine that she was no  
7 longer required, in fact respondents were prohibited from  
8 litigating the matter in an arbitration process -- so to answer  
9 your question succinctly, the arbitration has been pending for  
10 a very long time. It has not gotten very far. There is a  
11 dispute as to whose fault that is.

12 MR. FEIN: Yes. Obviously -- this is Mr. Fein  
13 speaking for the petitioner -- we would ask for an assessment  
14 of what transpired before the panel. But I don't think this is  
15 the occasion to raise it, I think is the bottom line, since the  
16 panel is not close, I think, to coming to any final judgment on  
17 the merits.

18 THE COURT: Thank you.

19 MS. BACHRACH: If I may, your Honor, this is Marion  
20 Bachrach for William Shine. I just think there's one more  
21 point of which the Court should be aware on the question of  
22 efficiency, as the Court has asked, which is that one reason  
23 for the delay is that Ms. Tantaros has had now seven different  
24 lawyers. With the appearance of new counsel on this matter  
25 today, that would be eight counsel. So that is the occasion

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1 for much delay, with going through all those different counsel.

2 THE COURT: OK. Let's do this, if counsel are OK with  
3 this. Let's just go off the record for a second. Let's have a  
4 quick conversation about potential settling of this case, if  
5 that's OK. Are counsel all right with that?

6 MR. FEIN: Yes. Mr. Fein.

7 MR. LAMPE: Yes, as long as we go back on the record,  
8 because we would like the Court to give us a specific deadline  
9 for the date to respond to the petition or answer or motion to  
10 dismiss so that there's no argument that we're in default when  
11 the 19th of August comes and goes.

12 THE COURT: All right. Let's go off the record.

13 (Discussion held off the record)

14 THE COURT: All right. Let's go back on the record  
15 then.

16 OK. We're back on the record. We had an  
17 off-the-record discussion about trying to resolve these issues  
18 efficiently. I have encourage counsel to continue to think  
19 about that.

20 Let me go ahead and give the respondent a date to  
21 respond. It has indicated a desire to file a motion to  
22 dismiss. And let me get a sense again from counsel as to what  
23 the nature of this motion to dismiss would be.

24 MR. LAMPE: Your Honor -- this is Matt Lampe -- the  
25 first argument would be that the statute is preempted. Whether

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1 we have additional arguments or not we have not thoroughly  
2 thought through. But the motion would be that the Court should  
3 dismiss the petition because on its face it's clear that the  
4 statute is exempted by federal law.

5 THE COURT: OK. Well, hold on a second. What we have  
6 here is we have the petition. The removal petition is seeking  
7 a declaratory judgment. And we have a motion to remand that  
8 has been filed by the plaintiff. So I'll need to decide this  
9 motion to remand. If the case is not remanded, I'm not sure if  
10 it's more efficient to have the respondents file a motion to  
11 dismiss or simply to file your motion for declaratory judgment  
12 and have the opposing motion for declaratory judgment filed by  
13 the plaintiff. It seems to me that maybe that makes more sense  
14 than having a motion to dismiss the underlying complaint, if  
15 we're here now in federal court on the removal petition. But  
16 let me hear from the respondents on that.

17 MR. LAMPE: This Matt Lampe. I think that would be  
18 fine. There is a legal issue to present, which is the  
19 preemption issue. From our perspective, it's presented  
20 appropriately on the motion to dismiss. If your Honor prefers  
21 that the parties brief it on cross-motions for declaratory  
22 judgment, I am not thinking of any reason why that would not  
23 also be perfectly appropriate. I think either way our position  
24 would be the Court should decide that preemption issue and can  
25 do so very quickly as soon as the jurisdictional question is

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1 determined.

2 THE COURT: OK. And let me just find out from  
3 respondents, was there something else you had planned on  
4 including in a motion to dismiss besides the preemption issue?

5 MR. LAMPE: No, your Honor. There are other arguments  
6 that we may consider including, one of which is the  
7 retroactivity argument. So we could say the statute is  
8 preempted. If you find that it is not preempted, then you  
9 could find that it is not applicable to this case. And there  
10 could be other arguments as well.

11 But the issue, petitioner, on the face of petition,  
12 raises really just one issue, and that is, is the statute  
13 preempted or not. And petitioner sought in state court  
14 declaratory judgment that there is no preemption. Our view is  
15 that the federal court should decide their issue under the  
16 doctrine that we invoked in our removal petition. So that may  
17 be raised in a motion to dismiss once the Court determines that  
18 it has jurisdiction. But if the Court determines that it has  
19 federal question jurisdiction, that's not to say that we can  
20 only raise federal questions before the federal court.  
21 obviously there would be other questions that could be raised,  
22 of course, if the Court has question jurisdiction.

23 THE COURT: OK. Plaintiffs, any thoughts on this?

24 MR. FEIN: Yes. This is Mr. Fein speaking for the  
25 plaintiff. The respondents, they tried to have it both ways.

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1 They're trying to say, OK, this is a federal question case, but  
2 argue on state law retroactivity as well. And that would moot  
3 any federal question, if you decided that it was not  
4 retroactive, so the prohibition didn't come into play at all.  
5 And generally speaking, in regard to constitutional cases, you  
6 try addressing a federal question if you can decide it on state  
7 law issues. And here, there's no injunctive federal issue  
8 first, and if you lose there, then you have the state law issue  
9 that may belong to the federal issue. That fails. I just  
10 don't see how that works. If they lose on the federal issue, I  
11 don't think you have the jurisdiction to consider the  
12 retroactivity issue. You no longer have subject matter  
13 jurisdiction.

14 And separately I believe that, as a matter of  
15 discretion, you would send the state law issue back to state  
16 court.

17 MS. BACHRACH: Your Honor, this is Marion Bachrach for  
18 Mr. Shine. I did brief the retroactivity issue as purely a  
19 state law issue.

20 THE COURT: Hold on a second. Counsel, hold on a  
21 second.

22 (Pause)

23 MS. BACHRACH: Good to go?

24 THE COURT: Hold on a second because sometimes they do  
25 this twice. Just wait a second.



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1 OK. Go ahead, counsel.

2 MS. BACHRACH: Thank you. What I was saying is that I  
3 disagree that the issue regarding retroactivity is purely a  
4 state law issue. It certainly can be part of the motion to  
5 dismiss. It's a very strong issue with respect to, the face of  
6 the statute alleges less history, but there is very important  
7 federal Supreme Court law, and recent Supreme Court law, that  
8 plaintiff, Ms. Tantaros, has quoted, and that clearly is  
9 germane to the retroactivity, or I should say nonretroactive  
10 issue. So it's not purely a state court issue at all.

11 MR. FEIN: Your Honor, this is Mr. Fein again. I  
12 simply part company. I don't see how anything that has been  
13 said shows that whether 7515 is retroactive implicates the  
14 United States Constitution or the Federal Arbitration Act. The  
15 Federal Arbitration Act doesn't say anything at all about  
16 whether a statute is retroactive or not. It's purely  
17 interpretation of state law. If you were to decide 7515  
18 applies retroactively, you would look exclusively at state law,  
19 because that governs. If it's retroactive, it may have  
20 consequences. But the issue of retroactivity in isolation is a  
21 purely state law issue.

22 THE COURT: OK. Let's do this.

23 MS. BACHRACH: Your Honor --

24 THE COURT: Hold on. I'm not going to make this  
25 decision now. I was trying to get a sense of where we were in

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1 terms of efficiency, getting everything teed up for me to  
2 decide. So let's do this. We have a motion schedule for the  
3 motion to remand and an opposition for the motion to remand as  
4 well as a reply schedule. Let's set a conference date, because  
5 I do need to deal with the issue of jurisdiction first. Let's  
6 set a conference date for September 19th. Does that work for  
7 everyone? At 11 o'clock?

8 MS. BACHRACH: No, I'm not --

9 THE COURT: I can't hear you, counsel.

10 MR. FEIN: Your Honor.

11 MR. LAMPE: Your Honor, this is Matt Lampe. That date  
12 works for 11 o'clock in the morning.

13 MS. BACHRACH: Your Honor, this is Marion Bachrach.  
14 It doesn't work for me. I teach a course on Thursday. I can't  
15 do that. I apologize.

16 THE COURT: All right. How about Monday, September  
17 23rd, at 11 o'clock?

18 MR. LAMPE: This is Matt Lampe. That works for the  
19 four respondents that we represent.

20 MR. FEIN: Your Honor, this is Bruce Fein. I have an  
21 oral argument in the U.S. Court of Appeals for the District of  
22 Columbia Circuit. You know, they have the case there. I  
23 haven't been told whether it's the first case or not. They  
24 have oral argument from 9 to noontime. That morning, then, is  
25 foreclosed. I could do it any time in the afternoon.

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1 THE COURT: All right. Hold on a second.

2 How about October the 2nd, then? That's a Wednesday.

3 At 2 o'clock p.m.

4 MR. LAMPE: That is Matt Lampe for respondent. That  
5 works for us.

6 MR. FEIN: Bruce Fein for the petitioner. That works  
7 for me. Yes.

8 MS. BACHRACH: Marion Bachrach. That works for me.  
9 What was the time, your Honor?

10 THE COURT: 2 o'clock.

11 MS. BACHRACH: Thank you very much.

12 MR. CARROLL: And from Quinn Emanuel, on behalf of the  
13 Estate of Roger Ailes, that works for us as well.

14 THE COURT: All right. So we will have a status  
15 conference at 2 o'clock. I hope to have a decision regarding  
16 jurisdiction by then. And at that point we will deal with  
17 setting a schedule if necessary for a motion to dismiss or a  
18 motion for declaratory judgment. But I do need to deal with  
19 the issue of jurisdiction first. So we'll again stay any  
20 motion to dismiss or any answer until that date. We'll deal  
21 with it on that date.

22 Anything else from plaintiff today?

23 MR. FEIN: No, your Honor. Thank you.

24 THE COURT: Anything else from defendants today?

25 MR. LAMPE: That is Matt Lampe. Not for the four

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1 respondents that we represent.

2 MS. BASAR: Your Honor. I apologize. This is Demet  
3 Basar from Wolf Haldenstein for plaintiff. It's not clear to  
4 us whether your Honor wants an in-person conference or a  
5 telephonic conference.

6 THE COURT: Let's do that one in person.

7 MS. BASAR: Thank you, your Honor.

8 THE COURT: Anything else from the other defendants?

9 OK. We're adjourned.

10 COUNSEL: Thank you, your Honor.

11 (Adjourned)